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IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

JUAN RAMON ROMO ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Fifth Appellate District

REPLY TO RESPONDENTS' SUPPLEMENTAL BRIEFS

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REPLY TO RESPONDENTS' SUPPLEMENTAL BRIEFS

Respondents have filed two supplemental briefs, one addressing this Court's decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*, No. 01-1289 (April 7, 2003) ("SF Supp."), and one purporting to address the six *amicus* briefs filed in support of certiorari ("*Amicus* Supp."). Both of these briefs further illustrate why, at a bare minimum, a GVR is required. But more importantly, they (like the supplemental brief filed by Respondents in *Ford Motor Co. v. Smith*, No. 02-1096) also illustrate why plenary review is warranted to address critical issues unique to product liability and other cases involving activities that benefit society but necessarily create a risk of personal injury and death.

1. In one brief, Respondents argue that "there is no basis for" GVR in light of *State Farm*, *see* SF Supp. 1, 9-10, while in the other they declare that *State Farm* addressed and resolved the "central theme" of all six *amicus* briefs by "clarify[ing] the standards for determining reprehensibility, evaluating the allowable ratio between punitive and compensatory damages, assessing the relevance of other sanctions, and ascertaining the ability of a jury to award punitive damages for conduct occurring in other states." *Amicus* Supp. 2. As Ford demonstrated in its Reply (at 8-10), *State Farm* plainly mandates a GVR for further consideration of Ford's due process challenges to the $290 million award here, which is the largest personal injury award affirmed in U.S. history, is 63 times the compensatory award, and 362 times the maximum available civil fine (which Respondents again do not mention).

In fact, this Court in *State Farm* squarely rejected multiple fundamental predicates of the court of appeal's decision reinstating the award, including (1) its improper effort to punish Ford in this civil case for a crime that was never alleged or proven and its disregard of the "comparable penalties" guidepost based on this specious criminal analogy; (2) its ruling that Ford's "enormous monetary resources" provided Ford with adequate notice that such a massive fine

could be imposed; (3) its holding that a 63:1 ratio is constitutionally permissible despite the substantial $4.6 million compensatory award; (4) its holding that Ford could be punished based on its nationwide sales; and (5) its highly deferential review of the jury's verdict, which incorporated California's lax "substantial evidence" standard, assuming the jury found every disputed fact against Ford, and then compounding the problem by assuming (as Respondents still do, SF Supp. 1) that the trial court had endorsed this shocking verdict—even though the trial court had *overturned* the jury's verdict as a "fundamentally suspect" product of "passion and prejudice." Pet. App. 37a, 45a; *see generally* Reply 8-10.

Finally, Respondents' suggestion that *State Farm* does not bear on the analysis of punitive damages in the personal injury context cannot be reconciled with this Court's decision to GVR two personal injury cases (and five cases overall) in light of *State Farm*. *See Anchor Hocking, Inc. v. Waddill*, No. 02-370; *Key Pharms. v. Edwards*, No. 02-342.

2. From start to finish, Respondents try to distinguish *State Farm* on the very basis that Ford has argued warrants plenary review: that this case, unlike "any punitive damages case thus far reviewed by this Court" involves "'physical' harm" and "deaths," rather than "mere 'economic' harm." SF Supp. 1, 2. Relying on their claim that "Ford knew its conduct would likely kill, and Ford's conduct has killed," SF Supp. 10—and ignoring the fact that every manufacturer of virtually every product, from boats and bathtubs to pharmaceuticals and forklifts, "knows" that its product "would likely kill" and "has killed"—Respondents argue that Ford's balancing of safety and utility 25 years ago was at the "*highest* levels of reprehensibility," because of the results of the single accident here. SF Supp. 1.

The fallacy of Respondents' simplistic and indefensible approach to the issue of reprehensibility in product liability cases is demonstrated by a front-page article in the *Wall Street Journal* published just yesterday, showing that *thousands* of injuries were caused in 2001 by pillows, books,

crayons, nails and electric Christmas decorations, among other products. *See* Jane Spencer and Cynthia Crossen, *Why Do Americans Believe Danger Lurks Everywhere? Fixation on Risk, Fed by Labs, Law and Media, Haunts The World's Safest Nation*, WALL ST. J., Apr. 24, 2003, at A1. Surely, if a jury finds a defect in, for example, an electric Christmas decoration, a massive punitive damage award cannot be permissible simply because the manufacturer knew of the potential for injury. Indeed, these considerations presumably explain why this Court in *State Farm*, in a passage ignored by Respondents, was careful to note that "[t]he existence of any one . . . factor[ ] weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award." Slip op. 8.

In short, the mere fact that the jury found that Ford's conduct in selling the 1978 Bronco as designed led to the tragic deaths in this case is no reason to ignore, as Respondents do, all of the factors weighing in favor of reduced reprehensibility, including (1) Ford's compliance with government and industry standards; (2) the reasonable disagreement within the engineering community over roof strength standards; (3) the lack of any evidence that the 1978 Bronco's roof design had injured any other person; and (4) the vagueness of California's malice standard and the lack of any evidence that any individual at Ford acted maliciously or believed that the company was "compromising consumer safety" when it built the 1978 Bronco. Pet. App. 32a; *see also* Reply 2-3. The presence of personal injury does not permit a court to abdicate its responsibility to evaluate the degree of reprehensibility through a careful examination of the entire record—including undisputed factors that are not necessarily inconsistent with the jury's "malice" finding—under proper constitutional standards.

Rather than analyze the *Gore* guideposts with "care, to ensure both reasonableness and proportionality," *State Farm*, slip op. 17, Respondents (like the court below) mischaracterize the record and engage in exaggerated and *ad hominem* invective that casually re-labels genuine disputes regarding the appropriate risk-utility balance as "manslaughter" and

"kill[ing]." SF Supp. 1, 10. As Ford and the *amici* have demonstrated, *see* Pet. 9-19; Reply 1-8, lower courts around the country—including the court of appeal here and the courts in *Smith* and *Clark v. Chrysler Corp.*, 310 F.3d 461 (6th Cir. 2002)—have nullified the *Gore* guideposts in product liability cases involving personal injury, thus creating a problem of fundamental importance to the entire business community. Respondents' supplemental briefs have provided the Court with additional evidence that plenary review is needed to bring this problem to a halt once and for all.

CONCLUSION

The Court should grant plenary review or, in the alternative, GVR. Respectfully submitted.

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